Supreme Court, U.S.
FILED

941312 FEB 1 1995

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1994

JOHN HENDERSON AND HENDERSON AVIATION, INC.,

Petitioners,

v.

OREGON DEPARTMENT OF AGRICULTURE, BRUCE ANDREWS, DIRECTOR,

Respondents.

On Petition For Writ Of Certiorari To The Oregon Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

JULIE K. BOLT
TIMOTHY E. MILLER
MARTIN, BISCHOFF, TEMPLETON, LANGSLET & HOFFMAN
3100 First Interstate Tower
Portland, OR 97201-5667
(503) 224-3113

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

74

QUESTION PRESENTED

Does the Federal Insecticide, Fungicide and Rodenticide Act preempt a state agency from penalizing a pesticide applicator based on the agency's interpretation of pesticide label language which is contrary to the EPA's published interpretation of the language?

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISION INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 8

A. The Court of Appeals decision leaves States free to apply their own interpretations to federally approved and required pesticide label language .. 8

B. The decision of the Oregon Court of Appeals is erroneous 12

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Cipollone v. Liggett Group, Inc., ___ U.S. ___, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) 6, 8

King v. E.I. DuPont de Nemours and Co., 996 F.2d 1346, (1st Cir. 1993) 6, 7

Papas v. Upjohn Co., 985 F.2d 516 (11th Cir. 1993) 7

Ruckelshaus v. Monsanto Co., 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984)..... 4

Wisconsin Public Intervenor, ___ U.S. ___, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991)..... 4

Worm v. American Cyanamid Co., 5 F.3d 744 (4th Cir. 1993) 7

STATUTES AND RULES

7 U.S.C. § 136 *et seq*.....2, 4

7 U.S.C. § 136ee..... 9

7 U.S.C. § 136j(a)(2)(G) 9

7 U.S.C. § 136v(a) 6, 11

7 U.S.C. § 136v(b) 2, 6, 7, 8, 11, 12

7 U.S.C. § 136v(c) 8

28 U.S.C. § 1257(a) 2

40 C.F.R. 152 through 186..... 4

40 C.F.R. 156.206(a)..... 5

40 C.F.R. 162 9

40 C.F.R. 170 5

40 C.F.R. 170.210(a)..... 5

40 C.F.R. 170.3.....10, 13

TABLE OF AUTHORITIES – Continued

Page

40 C.F.R. 170.3(a) 4, 5
ORS 183.310 to 183.550 11
ORS 634.372(2) 3, 9, 10, 11
53 Fed. Reg. 25974 ..... 5, 9, 13
53 Fed. Reg. 25988 ..... 5, 9, 10
57 Fed. Reg. 38147 5

No. _____

In The

Supreme Court of the United States

October Term, 1994

JOHN HENDERSON AND HENDERSON AVIATION, INC.,

Petitioners,

v.

OREGON DEPARTMENT OF AGRICULTURE, BRUCE ANDREWS, DIRECTOR,

Respondents.

On Petition For Writ Of Certiorari To The Oregon Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

John Henderson and Henderson Aviation, Inc. respectfully petition for a writ of certiorari to review the judgment of the Oregon Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Oregon Court of Appeals (App., *infra*, 1) is reported at 128 Or.App. 169, 875 P.2d 487, *rev. denied* ___ Or. ___ (1994). The opinion of the Director of

the Oregon Department of Agriculture (App., *infra*, 16) is unreported.

JURISDICTION

The opinion of the Oregon Court of Appeals was entered on May 25, 1994. The Oregon Supreme Court denied a timely petition for review on October 4, 1994. On December 22, 1994, Justice Sandra Day O'Connor signed an order extending the time for filing this petition for certiorari to and including February 1, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

Section 136v(b) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.*, prohibits states from imposing or continuing in effect "any requirements for labeling or packaging in addition to or different from those required" under FIFRA.

STATEMENT

Petitioner Henderson Aviation Co., Inc. is a company engaged in the aerial application of pesticides in Oregon. Petitioner John P. Henderson is employed by Henderson Aviation as a pilot and aerial pesticide applicator. In 1991, the Oregon Department of Agriculture ("ODA") issued to each petitioner a Notice of Imposition of Civil Penalty

based on four aerial applications of pesticide.[1] The ODA contended that in all four applications, petitioners applied pesticides inconsistent with labeling in violation of ORS 634.372(2).[2] (App., *infra*, 39-43). All four violations were consolidated and a contested case hearing was conducted.

Bruce Andrews, Director of the ODA ("Director") concluded that in three of the four applications[3] petitioners applied pesticides inconsistent with the following label language:

> Do not apply this product in such a manner as to directly or through drift expose workers or other persons.

The Director interpreted the word "expose" in the label language to mean "creates a situation where a person may come into contact with the pesticide." (App., *infra*, 36-37). He concluded that the label language "informs an applicator not to allow *any* drift of the pesticide to an

---

[1] The applications occurred on April 18, 1990, June 29, 1990, May 15, 1991 and July 1, 1991.

[2] ORS 634.372(2) provides:

No person shall:

> . . . As a pesticide applicator or operator, intentionally or willfully apply or use a worthless pesticide or any pesticide inconsistent with its labeling, or as a pesticide consultant or dealer, recommend or distribute such pesticides.

[3] The pesticides applied were Thiodan, Bravo and Lorsban. Each pesticide was registered and labeled in accordance with FIFRA. The fourth violation was for allegedly improper mixing of a pesticide before application. That violation (referred to as violation no. 3 in the record) is not a subject of this appeal.

area occupied by a person." (App., *infra*, 37-38). The Director found that petitioners had violated the label language based on soil and grass samples which showed the presence of small amounts of pesticide in areas occupied by humans. No evidence was presented establishing that any pesticide contacted or affected any human being. (App., *infra*, 25-32).

Petitioners appealed the Director's decision to the Oregon Court of Appeals. Petitioners argued that the Director's interpretation of the term "expose" is contrary to the EPA's interpretation and thus is expressly preempted by FIFRA. (Appellants' Brief, 16). The Court of Appeals rejected this argument and upheld the Director's penalty order. (App., *infra*, 7-9).

When first enacted, FIFRA, 7 U.S.C. § 136 *et seq.*, was primarily a pesticide licensing and labeling law. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991, 104 S.Ct. 2862, 2866, 81 L.Ed.2d 815 (1984). In 1972, Congress recast it as a comprehensive program regulating the sale, use and labeling of pesticides. *Wisconsin Public Intervenor*, ___ U.S. ___, 111 S.Ct. 2476, 2479-80, 115 L.Ed.2d 532 (1991).

Congress authorized the Administrator of the Environmental Protection Agency ("EPA") to promulgate regulations to carry out the provisions of FIFRA. 7 U.S.C. § 136w. Pursuant to this authority, the EPA promulgated 40 C.F.R. 152 through 186. At the time the registrants wrote the labels at issue in this case, 40 C.F.R. 170.3(a) provided:

> No owner or lessee shall permit the application of pesticide in such a manner as to directly or

> through drift expose workers or other persons * * * .

That wording is substantially similar to the label wording at issue in this case and it may be presumed that the regulation is the source of the label language.

The term "expose" is not defined in either FIFRA or the regulations. However, the meaning intended by the EPA is made apparent in a subsequent amendment to 40 C.F.R. 170. Part 170 sets forth standards for protection of workers during application of pesticides. *See* 53 Fed. Reg. 25974 ("Proposed Part 170 contains detailed provisions designed to protect pesticide handlers and other persons who work on farms, forests, nurseries and greenhouses."). In 1988, the EPA proposed amendments to Part 170, including replacement of Part 170.3(a) with the following provision:

> The handler employer and the handler shall ensure that no pesticide is applied so as to *contact* either directly or through drift, any worker or other person * * * .

40 C.F.R. 170.210(a) (emphasis added). In the commentary to the proposed amendments, the EPA explained that the change from "expose" to "contact" was made in order to clarify the instructions. 53 Fed. Reg. 25974 (July 8, 1988). "The term 'contact' has been substituted for the less precise term 'expose.' " 53 Fed. Reg. 25988 (July 8, 1988). In 1992, the EPA incorporated this more precise language into the labeling requirements. 40 C.F.R. 156.206(a)(57 Fed. Reg. 38147, August 21, 1992).

This Court has summarized the principles governing preemption analysis as follows:

> The purpose of Congress is the ultimate touchstone of preemption analysis.
>
> Congress' intent may be explicitly stated in the statute's language or implicitly contained in its structure and purpose. In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.

Cipollone v. Liggett Group, Inc., ___ U.S. ___, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992) (citations and internal quotations omitted) *quoted in King v. E.I. DuPont de Nemours and Co.*, 996 F.2d 1346, 1348 (1st Cir. 1993).

Since 1972 FIFRA has included an express preemption provision. Under the caption "Authority of States," Section 136v provides:

> (a) In general
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136v.

While this express preemption provision authorizes states to regulate the sale or use of pesticides, it requires

them to defer to federal laws concerning labeling. For instance, Section 136v(b) preempts state law tort claims based on failure to warn as imposing impermissible labeling requirements. *King v. E.I. DuPont de Nemours and Co.*, 996 F.2d 1346 (1st Cir. 1993); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993); *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993). Only the federal government, through the EPA, can decide what goes on a pesticide label. "The EPA has promulgated comprehensive labeling requirements governing the scope, content, wording and format of herbicide labeling." *King v. E.I. DuPont de Nemours and Co., supra,* 996 F.2d at 1347.

Nonetheless, the Oregon Court of Appeals concluded that the ODA's interpretation of the label language did not "violate section 136v(b)'s prohibition against imposing a labeling requirement * * * ." (App., *infra,* 9). The Court reasoned that because the EPA's commentary was in the context of the worker protection section of the regulations, it need not be applied in interpreting the labeling regulations. (App., *infra,* 9).

Petitioners sought review in the Oregon Supreme Court. Review was denied on October 4, 1994. (App., *infra,* 56).

REASONS FOR GRANTING THE PETITION

This case presents an important issue of federal law that has not been, but should be, addressed by this Court.

A. The Court of Appeals decision leaves States free to apply their own interpretations to federally approved and required pesticide label language.

"When Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue," there is generally no need to look beyond that provision. *Cipollone, supra,* 112 S.Ct. at 2618. Congress has expressly and unequivocally stated that only the federal government can decide what goes on a pesticide label. 7 U.S.C. § 136v(b). It necessarily follows that only the EPA can decide what the pesticide labels mean. If the EPA indicates that "expose" means "contact," then States must abide by that interpretation. A State's interpretation of federally approved label language in the face of a contrary interpretation expressed by the EPA has the effect of "continuing in effect" label language which has been disavowed by the EPA.

FIFRA and its related regulations represent a complex regulatory framework for the registration, labeling and use of pesticides. This regulatory framework provides specific roles for state agencies as well as the federal government. States are allowed to register pesticides and approve labels only as specifically provided under Section 136v(c), which provides for state registration of pesticides "to meet special local needs." The parameters of this authority and specific guidelines for its

application are set forth in 40 C.F.R. 162. By interpreting federally approved label language in a manner inconsistent with the EPA's interpretation, the ODA has sidestepped the regulatory framework established by FIFRA.

It is unlawful under FIFRA, as well as ORS 634.372(2), "to use any registered pesticide in a manner inconsistent with its labeling." 7 U.S.C. § 136j(a)(2)(G). However, FIFRA, unlike ORS 634.372(2), defines what it means to use a pesticide in a manner inconsistent with its labeling. It means "to use any registered pesticide in a manner not permitted by the labeling * * * ." 7 U.S.C. § 136(ee). The EPA has made it clear that the conduct which is not permitted by the label language at issue in this case is application of pesticide so as to contact workers or other persons. Thus, Petitioners have not applied a pesticide in a manner inconsistent with its label, as defined under federal law.

ORS 634.372(2) contains a provision identical to 7 U.S.C. § 136j(a)(2)(G), prohibiting application of "any pesticide inconsistent with its labeling * * * ." However, the ODA has interpreted ORS 634.372(2) and the label language to prohibit any application which "creates a situation where a person may come into contact with the pesticide." (App., *infra*, 36-37). The Oregon Court of Appeals has endorsed this interpretation. (App., *infra*, 36-37). Thus, the ODA and the Oregon Court of Appeals have ruled that the label prohibits application of pesticide in a manner which may potentially contact workers or other humans. This ruling conflicts with federal law.

The purpose of the label language in this case has always been to protect workers involved in the application of pesticides. 53 Fed. Reg. 25974, 25988 (July 8, 1988).

When this language was reviewed for amendment in 1988, the EPA specifically stated that it did not intend to regulate or prohibit drift.

> This proposal continues the general prohibition on exposure of workers through drift of pesticides from the site of application. Application may not take place if weather or other conditions are such that pesticides may drift beyond the treated area and contact nearby workers. The Agency is aware of the problems that may result from drift exposure of workers, especially during aerial and airblast applications. Since drift potential is affected by many situational factors – wind speed and direction; nozzle size, type, angle and pressure; release pattern; aircraft type, height and speed; topography; particle size – the Agency considers development of specific regulatory requirements pertaining to drift to be infeasible at this time.

53 Fed. Reg. 25988.

Since 1988, the EPA has made it clear that the language in 40 C.F.R. 170.3, upon which the label language in this case is presumably based, prohibits application of pesticides so as to *contact* workers or other persons. The State of Oregon, despite the EPA's clear expression of intent, has used this label language to effectively prohibit pesticide drift through application of ORS 634.372(2).

> According to the Department's understanding, the direction informs an applicator not to apply the pesticide in a manner that results in drift of any quantity to an area where a person may come into contact with it, or put another way, the direction informs an applicator not to allow *any* drift of the pesticide to an area occupied by

> a person. (App., *infra*, 37-38) (emphasis in original).

The ODA has penalized Petitioners for using a pesticide in a manner inconsistent with its label pursuant to ORS 634.372(2). In doing so, the ODA applied an interpretation of the label which is different from the EPA's interpretation. Thus, the ODA has given the label a meaning which is "in addition to or different from" the labeling requirements under FIFRA.

By using ORS 634.372(2) and their own interpretation of label instructions, the ODA has effectively prohibited all drift of pesticides during application. While it is possible that 7 U.S.C. § 136v(a) would permit a State to enact legislation that would regulate or even prohibit the drift of pesticides, it is undeniable that a State cannot do so under the guise of interpreting label language. To effectively regulate the use of pesticides, the State must utilize the legislative or administrative process: its legislature must pass a bill or an agency must enact regulations using the procedures set forth in the Administrative Procedures Act (ORS 183.310 to 183.550). In either case, affected individuals, businesses and industries have an opportunity to comment on the proposed regulations. By using its interpretation of federally required label language to accomplish its regulatory purpose, the ODA has ignored both legislative and administrative rule-making requirements and denied the pesticide and agricultural industries as well as the public any opportunity to be heard.

The title of 7 U.S.C. § 136v(b) is "Uniformity." If States are left free to apply any definition they choose to

pesticide label language, then the uniformity of labels becomes an illusion. If Oregon defines "expose" to mean "creating a situation where a person may come into contact with a pesticide," and the EPA defines it as meaning "contact," uniformity is defeated. If the Oregon Court of Appeals decision stands, pesticide applicators can be penalized by the States for applying pesticide in a manner which is consistent with the labeling as drafted and defined by the EPA. Uniformity of pesticide labeling is nullified.

The ODA's practice, affirmed by the Oregon Court of Appeals, is to take soil and vegetation samples after a pesticide application and to fine the applicator if *any* amount of pesticide is found off target. Thus, the ODA has created strict liability for pesticide drift under the guise of interpreting label language. The EPA did not intend such draconian results when it drafted the label language. It specifically stated that it did not intend to regulate drift. The ODA's attempt to circumvent the EPA's intended meaning of the label language is expressly preempted by Section 136v(b).

B. The decision of the Oregon Court of Appeals is erroneous.

By interpreting a pesticide label in a manner inconsistent with what is now federal law, the ODA imposes a labeling requirement that is different from what is required under FIFRA. The Court of Appeals erred in concluding that the ODA's interpretation of the label is not preempted.

In 1988, the EPA announced proposed amendments to 40 C.F.R. 170.3 and other regulations governing pesticide use. 53 Fed. Reg. 25974 (July 8, 1988). A primary reason for the amendments was the difficulty of enforcing the regulations as written. *Id.*

> The wording of certain requirements in the present Part 170 leaves room for broad interpretation due to lack of specificity. Under these circumstances, enforcement is difficult for the Agency and potentially unfair to those with Part 170 duties. * * * Careful drafting can assure clarity of language and achievement of intended regulatory purpose.

53 Fed. Reg. 25974 (July 8, 1988).

Thus, the EPA intended the changes in the wording to clarify the regulations, *not* to change their intended meaning. It is in this context that the EPA explained that "[t]he term 'contact' has been substituted for the less precise term 'expose' " in 40 C.F.R. 170.3. 53 Fed. Reg. 25988 (July 8, 1988). The regulatory purpose of Part 170.3 has always been to prohibit pesticide contact with workers through drift, not to prohibit any drift, however minuscule.

The Court of Appeals dismissed the EPA commentary with a strangely twisted analysis. The court interpreted the commentary to mean that the EPA "recognized that 'expose' is subject to broad interpretation." (App., *infra*, 8). Thus, the court concluded that the EPA, rather than rejecting it, had somehow endorsed a "broad interpretation" of "expose," rendering the Director's definition acceptable. (App., *infra*, 8). It is clear from the commentary that the EPA was recognizing a problem that

resulted from imprecise language in the regulation. It proposed and later adopted changes to clarify (not change) that language to make its intended purpose more clear. It did not endorse or permit "broad interpretations" of the regulatory language.

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be granted.

Respectfully submitted,

JULIE K. BOLT
TIMOTHY E. MILLER
MARTIN, BISCHOFF, TEMPLETON,
LANGSLET & HOFFMAN
3100 First Interstate Tower
Portland, OR 97201-5667
(503) 224-3113

Counsel for Petitioners

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

John P. HENDERSON
and Henderson Aviation Co., Inc.,
Petitioners,

v.

DEPARTMENT OF AGRICULTURE,
Bruce Andrews, Director,
Respondent.

(603-714-NR021-91; CA A76943)

Judicial Review from Department of Agriculture.

Argued and submitted September 27, 1993.

Timothy E. Miller argued the cause for petitioners. With him on the brief were Laura Van Harlingen Potter and Martin, Bischoff, Templeton, Langslet & Hoffman.

Richard D. Wasserman, Assistant Attorney General, argued the cause for respondent. With him on the brief were Theodore R. Kulongoski, Attorney General, and Virginia L. Linder, Solicitor General.

Before Deits, Presiding Judge, and Riggs and Haselton,* Judges.

DEITS, P. J.

Affirmed.

DEITS, P. J.

---

* Haselton, J., *vice* Durham, J.

Petitioners seek review of a final order of the Oregon Department of Agriculture (ODA) imposing civil penalties for four violations of the State Pesticide Control Act. ORS chapter 634. We affirm.

Petitioners are a licensed pesticide applicator and his employer, a licensed pesticide operator.[1] In 1991, the ODA issued to each petitioner a Notice of Imposition of Civil Penalty based on four aerial applications of pesticide. OAR 603-57- 510(5). A contested case hearing was conducted at petitioners' request, ORS 634.905(2), for which the four violations against each petitioner were consolidated. The facts as found by the director of the ODA are summarized here and are not in dispute.

On April 18, 1990, petitioners applied the pesticide Thiodan by aerial spray to a Christmas tree farm, located near the Alpine Elementary School playground. During the application, approximately 85 children and two teacher's aides were on the school playground. In response to a complaint from one of the aides regarding the spraying, an ODA pesticide investigator went to the school the following day and took a swab sample from the swingset and a composite sample of grass cuttings from the playground. The samples tested positive for endosulfan, the active ingredient in Thiodan.

---

[1] A pesticide applicator is one who sprays or applies pesticides for others, is authorized to work for and is employed by a pesticide operator, and is in direct charge of or supervises the spraying or application of pesticide. ORS 634.006(9). A pesticide operator is one who "owns or operates a business engaged in the application of pesticides upon the land or property of another." ORS 634.006(13).

On June 29, 1990, petitioners aerially applied the pesticide Tilt to a grass field owned by Heitzman. Before the application, the pesticide was mixed in 7.5 gallons of water per acre. The Tilt label requires that, for aerial application, the pesticide be mixed in a minimum of 10 gallons of water per acre.

On May 15, 1991, petitioners applied the pesticide Bravo by aerial spray to a grass seed field adjacent to the Laird residence. In response to Laird's complaint that the spray landed on his lawn, two ODA pesticide investigators took a sample of grass cuttings and dug a soil sample from his backyard. The grass sample tested positive for the active ingredient in Bravo.

On July 1, 1991, petitioners applied the pesticide Lorsban to a Christmas tree farm adjacent to Parker's property and in the vicinity of Berg's property. Parker, who heard the helicopter, but could not see it because of haze, keeps cattle and dogs on his property. Berg, who observed the application of the pesticide, has an organic strawberry field on his property. In response to Berg's complaint, an ODA investigator took samples from his property on the day of the application and took a grass sample from Parker's property a few days later. The samples from Berg showed no detectable amount of the active ingredient in Lorsban, but the Parker sample tested positive. The Thiodan, Bravo and Lorsban labels all stated: "Do not apply this product in such a manner as to directly or through drift expose workers or other persons."

For each application, the director concluded that petitioners applied pesticides inconsistent with the directions on the pesticide labels in violation of ORS 634.372(2). The director then applied the ODA's penalty formula, OAR 603-57-500 to OAR 603-57-530, and imposed a civil penalty of $4,310 against each petitioner. ORS 634.900; ORS 634.915.

Petitioners first assign as error the director's conclusion that ORS 634.372(2) does not violate Article I, section 21 of the Oregon Constitution.[2] That statute provides:

> "No person shall:
>
> " * * *
>
> "(2) As a pesticide applicator or operator, intentionally or willfully apply or use a worthless pesticide or any pesticide inconsistent with its labeling, or as a pesticide consultant or dealer, recommend or distribute such pesticides."

Petitioners contend that because the legislature gives to pesticide manufacturers "the right to decide what goes on the label," the statute impermissibly delegates legislative authority to private entities. *See Van Winkle v. Fred Meyer, Inc.*, 151 Or 455, 462, 49 P2d 1140 (1935).

We disagree. The statute does not, as petitioners suggest, blindly incorporate into law whatever a pesticide manufacturer chooses to put on its label. Federal and

---

[2] Article I, section 21 provides, in pertinent part:
"[N]or shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution[.]"

state laws require that, with limited exceptions, all pesticides must be registered with the Environmental Protection Agency (EPA) and the ODA, respectively. 7 USC § 136a(a); ORS 634.016(1). Under federal law, a pesticide will not be registered until the administrator has approved the label. 7 USC § 136a(c)(5)(B), (6); 40 CFR § 156.10(a)(6)(i). Similarly, in reviewing a registration application that must include the proposed label, the ODA may restrict or limit the use in Oregon of any pesticide. ORS 634.016(4)(d), (6)(a). For a label to be approved and a pesticide to be registered, the manufacturer must follow the specific labeling requirements imposed by a comprehensive federal regulatory scheme[3]

---

[3] There are several labeling regulations that pertain to the use of a pesticide, the aspect of the labels at issue here. Under the category of warnings and precautionary statements, 40 CFR § 156.10(h)(2)(i)(A) provides:

> "Where a hazard exists to humans or domestic animals, precautionary statements are required indicating the particular hazard, the route(s) of exposure and the precautions to be taken to avoid accident, injury or damage. The precautionary paragraph shall be immediately preceded by the appropriate hazard word."

Under the regulations specifically governing the directions for use, 40 CFR § 156.10(i)(2)(x)(F) provides that the directions must include "[a]ny limitations or restrictions on use required to prevent unreasonable adverse effects," including "pertinent information which the Administrator determines to be necessary for the protection of man and the environment." The directions must also include "[t]he method of application, including instructions for dilution, if required." 40 CFR § 156.10(i)(2)(vi).

For each of the above provisions, the administrator of EPA must determine if the label provided by the manufacturer satisfies the appropriate standard. For other federal labeling requirements, however, the regulations specify the exact language that the manufacturer must use. For instance, 40 CFR

and, to a lesser extent, state law.[4] Thus, even assuming that pesticide labels written by manufacturers are given the effect of law, we do not believe that the statute has left "wholly to persons outside of the legislature the power to determine whether there shall be a law at all and, if there is to be a law, what the terms of that law shall be." *LaForge v. Ellis*, 175 Or 545, 549, 154 P2d 844 (1945) (holding statute invalid as violative of Article I, section 21); *see also Van Winkle v. Fred Meyer, Inc., supra*, 151 Or at 461.

Petitioners also argue that the director erred in failing to hold that ORS 634.372(2) and the labels that it incorporates are unconstitutionally vague. That argument is inapposite, however, because the vagueness analysis applies only to penal, not civil, laws. *Megdal v. Board of Dental Examiners*, 288 Or 293, 605 P2d 273 (1980).

Petitioners next assign error to the director's interpretation of the term "expose" as used on the pesticide

---

§ 156.10(i)(2)(ii) provides that the directions for use must include the statement, "It is a violation of Federal law to use this product in a manner inconsistent with its labeling."

[4] The Federal Insecticide, Fungacide [sic] and Rodenticide Act (FIFRA), 7 USC §§ 136-136y, and its implementing regulations control the use and application of pesticides, but the states retain some regulatory authority. 7 USC § 136y(a). For purposes of uniformity, a "State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 USC § 136v(b). As a supplement to the federal pesticide labeling requirements, ORS 634.026(1)(e) requires that every pesticide label include "[a]dequate and necessary directions for its proper and intended use."

labels. In evaluating whether petitioners violated ORS 634.272(2) by applying pesticides in a manner that "exposed" workers or other persons, the director defined the label term "expose" to mean "creates a situation where a person may come into contact with the pesticide." Petitioners' sole challenge to that definition is based on their argument that the EPA defines expose as "actual contact" and that the director is bound by that definition under the federal statute requiring uniformity of pesticide labels. 7 USC § 136v(b). Petitioners concede that the term "expose" is not defined in the federal statute or regulations; however, they make their argument relying on a statement made in a commentary accompanying a proposed amendment to a worker protection regulation. They argue that even though the comment was made regarding a worker protection regulation, it is applicable here because the language used on the labels most likely derived from that regulation.[5] Petitioners also claim that, in amending the worker protection regulation, the EPA clarified it by substituting the term "contact" for the "less precise term 'expose.' " 53 Fed Reg 25974, 25988 (1992).[6] Therefore, they argue, the EPA intended those

---

[5] Before it was amended, the worker protection regulation at issue, 40 CFR § 170.3(a), provided, in part:

> "No owner or lessee shall permit the application of a pesticide in such a manner as to directly or through drift expose workers or other persons except those knowingly involved in the application."

[6] In 1988, the EPA proposed to revise its regulations governing worker protection from agricultural pesticides. 53 Fed Reg 25970 (1988). According to the EPA,

> "[t]he wording of certain requirements in the present Part 170 [governing worker protection] leaves room for broad

terms to be equivalent. Petitioners then conclude that when the EPA approved the labels at issue here, it interpreted "expose" to mean "contact" and that the director is bound by that interpretation.

We are not persuaded by any of petitioners' arguments on this point. First, we do not agree that the proposed amendment and commentary to the worker protection regulation constitute "the EPA's express and unambiguous interpretation" of the term "expose." Rather than reading the EPA's commentary to mean, as petitioners suggest, that contact is a more precise way of saying expose, we read the commentary to mean that contact is a more precise *term* than expose. Thus, regardless of what the EPA may have "always" intended, the director's definition of "expose" is consistent with the EPA's commentary, which recognized that "expose" is subject to broad interpretation. Further, even if the EPA had intended "contact" when it said "expose," it did so in

---

interpretation due to lack of specificity. Under these circumstances, enforcement is difficult for the Agency and potentially unfair to those with Part 170 duties." 53 Fed Reg 25974.

In reference to what was then 40 CFR § 170.3, application restrictions, the EPA proposed several changes, the last of which provided:

"The term 'contact' has been substituted for the less precise term 'expose.' " 53 Fed Reg 25988.

The regulation governing application restrictions for purposes of worker protection now reads:

"The handler employer and the handler shall assure that no pesticide is applied so as to contact, either directly or through drift, any worker or other person * * * ." 40 CFR § 170.210(a).

respect to the application of a worker protection regulation, not in the context of labeling requirements. As petitioners readily admit, the EPA did not require the exact language of the worker protection regulation to appear on pesticide labels.[7] Consequently, we do not see how the director's failure to follow the EPA's "interpretation" of "expose" in the context of worker protection would violate section 136v(b)'s prohibition against imposing a *labeling requirement* "in addition to or different from those required" under FIFRA.

In their fourth assignment of error, petitioners argue that the director's interpretation of ORS 634.372(2) was wrong as a matter of law. ORS 183.482(8)(a). Specifically, petitioners take issue with the director's interpretation of the phrase "intentionally or willfully apply or use * * * any pesticide inconsistent with its labeling." The director held:

> "In the context of ORS 634.372(2), the term 'intentionally' means that a person intends to make application of a pesticide (*i.e.*, he does so purposefully, and not accidently or inadvertently), but not that he also intends to make the application contrary to the directions on the

---

[7] The EPA's regulations now impose a labeling requirement specifically directed at worker protection. 40 CFR § 156.206(a) provides, in part:

> "Each product shall bear the statement: 'Do not apply this product in a way that will contact workers or other persons, either directly or through drift. Only protected handlers may be in the area during application.' "

> label. This interpretation includes negligent conduct, but is not limited to such conduct as ORS 634.372(4)."

ORS 634.372(4) provides that no person shall "[p]erform pesticide application activities in a faulty, careless or negligent manner."

According to petitioners, subsection (2) of ORS 634.372 prohibits intentional misapplication of pesticides and subsection (4) prohibits negligent misapplication of pesticides. They argue that when the ODA elected to prosecute an intentional misapplication instead of a negligent one, it was required to prove that petitioners intentionally applied a pesticide inconsistent with its label. Petitioners contend that the director's interpretation of subsection (2) renders subsection (4) meaningless because it treats a "deliberate action resulting in a label violation as an intentional violation of the terms of the label, merging the negligent and intentional violations."

In construing statutes, our task is to discern the intent of the legislature, looking first to the text and context of the provision at issue, *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143 (1993). Whenever possible, we will construe provisions of a statute so as to give effect to each. ORS 174.010; *PGE v. Bureau of Labor and Industries, supra*, 317 Or at 611.

Considering the words of the statute as well as its context, we conclude that the director's construction of the statute is consistent with the legislature's intent. In ORS 634.012, the legislature states that the purpose of the State Pesticide Control Act is to regulate in the public interest, *inter alia*, the application and use of pesticides.

The legislature recognized that although pesticides may be necessary and valuable, they can cause injury to health, property, wildlife or environment when applied or used in an improper or careless manner. ORS 634.012. In view of the extensive labeling requirements imposed by federal law, prohibiting the use of a pesticide in a manner inconsistent with its label advances the legislature's policy of preventing injury. The prohibition provides an incentive to operators and applicators to read the labels of the pesticides and thus decreases the risk of injury from improper use. Construing the statute in the manner urged by petitioners would not carry out that purpose because it would condone negligent noncompliance with label requirements. An operator or applicator who does not read a label could completely avoid prosecution for the noncompliance, despite the potential for injury.

In addition, contrary to petitioners' assertions, the director's construction of ORS 634.372(2) preserves the distinction between ORS 634.372(2) and ORS 634.372(4). As discussed above, subsection (2) does not prohibit intentional misapplications of pesticides; rather, it requires strict compliance with *all* label specifications whenever operators or applicators intentionally use or apply pesticides. Whether an operator or applicator intended to violate a label may be considered in assessing a penalty, ORS 634.915(2)(e), but it is immaterial to the determination of whether a violation has occurred.

Subsection (4), on the other hand, targets *application activities* that are performed in a "faulty, careless or negligent manner." Although a pesticide applied in such a manner might effectuate a labeling violation, not all label

specifications are directed at the manner of application. Consequently, a pesticide may be used inconsistent with its label even though the manner of application is neither faulty, careless nor negligent. For instance, a label specification concerning the storage and disposal of a pesticide has effect regardless of whether the pesticide is ever applied. Other specifications, such as those prohibiting grazing dairy or meat animals in treated areas, are directed at activities that occur *after* an application has been completed. Under petitioners' construction of subsection (2), however, applicators would not be committing a violation if they applied a pesticide properly but, because they failed to read the entire label, did not comply with the requirements concerning storage, disposal or grazing. ORS 634.372(2) would not be violated because, although the pesticide was used inconsistent with its label, the inconsistent use was not intentional. ORS 634.372(4) would not be violated because the application was not performed in a careless or negligent manner. Petitioners' construction thus produces a result that defeats the legislature's expressed purpose in regulating the use and application of pesticides. The director did not err in construing ORS 634.372(2).

In their next assignment of error, petitioners argue that the director erred in refusing to dismiss the three label violations alleging drift of pesticides. Petitioners argue that the ODA did not establish by a preponderance of the evidence that drift was the mechanism of transport for any of the pesticides from the targeted sites to the neighboring properties. Specifically, petitioners argue

that the positive samples offered by the ODA were insufficient in number to establish drift.[8] After reviewing the record, we conclude that substantial evidence supports the findings underlying the director's inference that the pesticides reach the neighboring properties through drift. ORS 183.482(8)(c).

Contrary to petitioners' assertions, the director's comment that petitioners offered no evidence of another means of transport did not shift to them the burden of proof on the issue. The absence of any evidence to suggest that the pesticides moved by means other than drift supports the *reasonableness* of the inference that the pesticides did move by drift. *City of Roseberg v. Roseberg City Firefighters*, 292 Or 266, 271-72, 639 P2d 90 (1981). Had petitioners offered evidence of another means of transport, that evidence might have cast doubt on the reasonableness of the inference, even if it was insufficient to support a finding as to that other means.

Petitioners next argue that because the ODA failed to prescribe a reasonable time for them to eliminate the violations, as required by ORS 634.900(2), the violations should have been dismissed. We disagree. ORS 634.900 provides:

> "(1) In addition to any other liability or penalty provided by law, the Director of Agriculture may impose a civil penalty on a person

---

[8] The director defined drift as "a movement of particles of pesticide through the air at the time of application." That definition is not challenged here, nor do petitioners challenge the historical facts underlying the director's inference that the pesticides moved by drift.

> for violation of any of the provisions of this chapter relating to pesticide application, sale or labeling. The civil penalty for a first violation shall be a fine of not more than $1,000. Upon a second violation, the department may impose a fine of not more than $2,000.
>
> "(2) A civil penalty may not be imposed under this section for violations other than those involving pesticide applications, sale or labeling violation under this chapter. The director in every case shall prescribe a reasonable time for elimination of a violation:
>
> "(a) Not to exceed 30 days after first notice of a violation; or
>
> "(b) In cases where the violation requires more than 30 days to correct, such time as is specified in a plan of correction found acceptable by the director."

However, even if we assume that the requirement of prescribing a reasonable time for elimination of a violation is applicable here and that the ODA's failure to do so here affected the director's authority to impose civil penalties, dismissal of the violations would be not be warranted. Under OAR 603-57-500(6), a violation is the commission of any prohibited act specified in ORS 634.372. Once it is established that a prohibited act has been committed, the violator is subject to one or more penalties.[9] Because the repercussions of having committed a violation extend beyond the imposition of a civil

---

[9] Under ORS 634.992, all violations are unclassified misdemeanors and are punishable by a fine or by imprisonment. Under ORS 634.322(4), any violation may serve as a basis for the ODA to revoke, suspend or refuse to issue or renew the violator's license or certificate.

penalty, the validity of the penalty as imposed has no bearing on the fact of the underlying violation. Thus, while the parties may debate whether the director properly imposed the civil penalty here, there is no question that the alleged impropriety is not grounds for dismissing the *violations*.[10] The director did not err in denying petitioners' motion to dismiss the violations.

Petitioners' final assignment of error does not merit discussion.

Affirmed.

---

[10] Because of our disposition of this issue, we need not address whether, under ORS 634.900(2), the director's authority to impose a civil penalty is conditioned on his having prescribed a reasonable time for the violator to eliminate the violation. Nor do we need to address whether that "condition" applies in a case such as this where the violation has already been committed and is not susceptible to "elimination."

BEFORE THE DIRECTOR

OF THE OREGON DEPARTMENT OF AGRICULTURE

In the Matter of the Imposition of Civil Penalties for Violation of ORS Chapter 634 by John P. Henderson and Henderson Aviation Co., Inc.	))))))	FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION, RULINGS ON OBJECTIONS AND ORDER

INTRODUCTION

During July 1991, the Department of Agriculture (Department) issued a Notice of Imposition of Civil Penalty against John P. Henderson as a pesticide applicator and against Henderson Aviation Co., Inc., the employer of Mr. Henderson, as a pesticide operator. Each notice alleged three violations based upon the same three aerial applications of pesticide by Mr. Henderson.

During August 1991, the Department issued another Notice of Imposition of Civil Penalty against Mr. Henderson and against Henderson Aviation. Each notice alleged a violation based upon the same aerial application of pesticide by Mr. Henderson.

On November 13, 1991, a prehearing conference was held before John Burgess, who had contracted with the Department to conduct the hearing and issue a proposed order. On November 20, 1991, February 26 and 27, 1992, a contested case hearing was held. By agreement, the four alleged violations against Mr. Henderson and against Henderson Aviation were consolidated at the hearing. Jane Ard and Stephen E.A. Sanders, Assistant Attorneys General, represented the Department. Timothy E. Miller,

Attorney at Law, represented both John P. Henderson and Henderson Aviation Co., Inc. (Hendersons). After the hearing, the parties were given time to submit written closing arguments and reply briefs. The Department and the Hendersons submitted both written closing arguments and reply briefs. Following review of the closing arguments and reply briefs, Mr. Burgess issued a recommended order to which exceptions were filed. Based upon review of the recommended order and exceptions, the Director now issues this Final Order.

RULINGS

Rulings were reserved on objections and on other matters until the time of this order.

Affirmative Defenses

In their answers, the Hendersons alleged that the notices were inadequate ("Notice fails to state a violation"). The notices are adequate. ORS 183.415.

The Hendersons also alleged that the violations are barred by laches. The Hendersons presented no evidence of prejudice caused by the lapse of time between the aerial applications in question and the Department's issuance of the notices. Therefore, there is no basis for the defense.

The Hendersons' allegation that the "calculation of penalties is without basis in fact or law" is considered in THE PENALTIES, *infra*.

Objections

During the hearing, the parties made a number of objections to the admissibility of testimony and documents, primarily on the basis of hearsay. The objections are overruled. ORS 183.450(1). All testimony and documents are admitted. In particular, the reports of the Department's Laboratory Services Division are admissible. *See, Law v. Kemp,* 276 Or 581, 588-89, 556 P2d 109 (1976) (blood test report); *Davis v. Georgia-Pacific,* 251 Or 239, 248, 445 P2d 481 (1968) (report of extent of pollution). However, not all of the hearsay evidence is relied upon in this order. *See, Reguero v. TSPC,* 312 Or 402, 418-22, 822 P2d 1171 (1991) (impact of admissible hearsay).

Motions to Dismiss

During the hearing, the Hendersons made motions to dismiss based upon the sufficiency of the evidence. The motions are denied for the reasons in this order, *infra.*

Constitutional Issues

The Hendersons argue that ORS 634.372(2) is "an unlawful delegation of legislative authority" under the Oregon Constitution. (Memorandum of Law at 1.) They claim that the statute relies "completely upon the discretion of the pesticide manufacturer or other entities to determine what shall be included on the labels" of pesticides, and "thus, what shall be the law." (*Id.* at 2.)

By "other entities," it is assumed that the Hendersons are referring to the Environmental Protection Agency, which has the regulatory authority to approve the language on labels. 7 USC § 136a. In fact, the language of the labels at issue here is substantially the same as the general standard of pesticide application at 40 CFR 170.3(a):

> "No owner or lessee shall permit the application of a pesticide in such a manner as to directly or through drift expose workers or other persons * * * ."

The Hendersons rely on *Hillman v. Wasco Co. PUD*, 213 Or 264, 323 P2d 664 (1958), and similar cases. However, *Hillman* and the other cases are inapposite.

In the present case, the legislature defined the prohibited act in ORS 634.372(2). The elements of the act are:

(1) a pesticide applicator or operator

(2) who intentionally

(3) applies a pesticide

(4) inconsistent with its labeling.

The legislature delegated to the Department the authority to determine whether a person has committed the act prohibited by ORS 634.372(2). The language of the label is a *fact* which must be proven, as is whether the person is a pesticide applicator, whether an application of pesticide was made, and if so, whether made intentionally and whether made inconsistently with the language on the label. Delegation of factual inquiries to an administrative agency is constitutional. *See, e.g., Multnomah County v. Laihn*, 180 Or 528, 541-42, 178 P2d 159 (1947).

Unlike *Hillman* and the other cases relied upon by the Hendersons, the legislature did not delegate to the EPA or pesticide manufacturers the formulation of the legal standard to be used to determine whether there has been a violation of the State Pesticide Control Act. The issue here is not whether the Hendersons violated the terms of the pesticide labels, but whether they have committed the act prohibited by ORS 634.372(2).

The Hendersons also argue that ORS 634.372(2) is unconstitutionally vague. Their argument is not persuasive. *See, Anderson v. Paden,* 284 Or 313, 587 P2d 59 (1978); *see also,* the discussion of THE LABELS, *infra.*

ORS 634.900(2)

The Hendersons moved to dismiss all the alleged violations on the ground that the Director of the Department did not comply with ORS 634.900(2). The Hendersons contend that:

> " * * * the director did not give [them] notice of an alleged violation and a reasonable time, or any time, for elimination * * * of the four alleged violations * * * ."

(Respondent's Closing Argument 12.)

(1) Compliance

ORS 634.900(1) authorizes the Director to "impose a civil penalty on a person for violation of any of the provisions * * * relating to pesticide application, sale or labeling." ORS 634.900(2) provides that:

> " * * * The director in every case shall prescribe a reasonable time for elimination of a violation:
>
> "(a) Not to exceed 30 days after first notice of violation; or
>
> "(b) In cases where the violation requires more than 30 days to correct, such time as is specified in a plan of correction found acceptable by the director."

The language, "a reasonable time for elimination of a violation," is not intended to be read literally. A "violation" occurs at the time of "commission of any prohibited act specified under ORS 634.372." OAR 603-57-500(6). The legislature did not intend that a person should be given a reasonable time to "eliminat[e]" the *fact* of a violation. Rather, the legislature intended that a violator be given "a reasonable time for elimination [of the cause or the effect] of a violation." For example, where the cause of the violation is an improper or unsafe application practice, the violator may be given an opportunity to show the Department that he has changed that practice to an appropriate one, or where the effect of the violation is contamination of an area away from the treatment site, the violator may be given an opportunity to clean up the contamination. However, in the event a violation is the result of *improper application* of a pesticide, as in the present case, no time is reasonable to correct the application after the fact; *i.e.*, by the time the Director learned of the violations, it was too late to undo the applications.

In the present case, the Department provided the Hendersons with Notices of Imposition of Civil Penalty

during July and August 1991. Former ORS 634.905(1).[1] In the case of two alleged violations, the notice was provided slightly more than one year after the acts, and in the case of the other two alleged violations, the notice was provided within two months after the acts.

The notices stated that the penalties were "due and payable immediately upon receipt" of the notices. (Notices, ¶ VI.) Former ORS 634.905(1). However, the notices provided that the Hendersons had an opportunity for a hearing on the alleged violations, and they requested a hearing. Their request for a hearing suspended the due date for payment of the penalties until after entry of a final order. Moreover, in their answers filed in response to the notices, the Hendersons not only denied commission of the alleged violations, but alleged that the "calculation of penalties is without basis in fact or law and an abuse of discretion." Their answers put in issue at the hearing whether they were liable for any penalties, and if so, the amounts of such penalties. The hearing was held during November 1991 and February 1992.

Therefore, as a practical matter, the Hendersons had more than three months from receipt of the notices until the hearing "for elimination" of the causes or effects of the alleged violations. No provision in ORS Chapter 634 or the Department's rules prevented the Hendersons from taking corrective action between receipt of the notices and the hearing. Their liability and the amounts

---

[1] The penalty procedure is now contained in ORS 183.090. *See*, Or Laws 1991, ch 734, § 57.

of the penalties, if any, would be determined based upon the evidence at the hearing. And they knew or should have known that based upon ORS 634.915(2)(f) and OAR 603-57-530(4)(f) their efforts to "correct" or "rectify" a violation was a factor to be considered in the determination of a penalty.

The Hendersons' complaint that "the director did not give [them] notice of an alleged violation and a reasonable time * * * for elimination" of the alleged violations (Resp Cl Arg 12) disregards that they were afforded more than three months from receipt of the notices until the hearing to correct the alleged violations; *i.e.*, 60 days more than ordinarily is required by ORS 634.900(2).[2] The Hendersons had the opportunity they complain was denied them. The fact that the Director did not expressly state that they had the opportunity is immaterial. The Hendersons' motion is denied.

(2) Noncompliance

Even assuming the Director did not strictly comply with ORS 634.900(2), noncompliance is not a ground for dismissal of the alleged violations. The Hendersons' motion is denied.

The Hendersons contend that "the legislature wanted to give the pesticide applicators and operators a chance

---

[2] The Hendersons presented no evidence that the time between the aerial applications and receipt of the notices prevented corrective action, or that the time between receipt of the notices and the hearing did not allow a reasonable time for corrective action. ORS 183.450(2).

to clean up their act before being subject to monetary penalties." (Resp Cl Arg 11.) The Hendersons apparently consider that the legislature enacted ORS 634.900(2) for the benefit of applicators and operators who violate the Act. The primary reason for the statute is to benefit the public interest, not violators. The statute is part of the Act, the purpose of which is "to regulate in the public interest the * * * application and use of pesticides" (ORS 634.012), and the penalty provisions are to be administered in the public interest. *See, e.g.,* ORS 634.910 (the Director may remit or reduce a penalty only on terms and conditions "proper and consistent with the public health and safety").

A benefit to violators may be found in the relationship between ORS 634.900(2) and 634.915(2)(f), which provides that the Director, in imposing a penalty, "shall consider" the "violator's cooperativeness and efforts to correct the violation." In other words, ORS 634.900(2) provides violators with "a chance to clean up their act" so as to provide the Director an opportunity to consider remission or reduction of a penalty according to the factor at ORS 634.915(2)(f).

The statute does *not* provide that the Director may not impose a penalty where "a reasonable time for elimination of a violation" is not given. And the legislature knows how to express a condition precedent to an agency's authority to impose a penalty. *See, e.g.,* ORS 468.126(1) (DEQ's authority: "No civil penalty * * * shall be imposed for a violation * * * until the [violator] has received five days' advance warning" and the opportunity to submit a response).

Because the statute is for the benefit of the public interest, because it can be reasonably interpreted as providing a violator with an opportunity to obtain remission or reduction of a penalty, and because there is no express provision which makes the opportunity to take corrective action a prerequisite to a penalty, the Hendersons' contention is not persuasive.

Finally, the Hendersons suffered no prejudice. In the notices, the Department calculated the penalties for alleged Violation Nos. 1, 2, and 3 according to the factors in its rule. OAR 603-57-530(4). In making the calculations, the Department assigned to the factor designed to implement ORS 634.915(2)(f) ("violator's cooperativeness and efforts to correct the violation") the value most favorable to the Hendersons. In alleged Violation No. 4, the Department assigned a different value to the factor because of the Hendersons' manner in assisting in the investigation of the alleged violation, not because of their efforts to take corrective action. The Hendersons presented no evidence that the Director's alleged noncompliance with ORS 634.900(2) prevented them from taking corrective action related to the alleged violations. ORS 183.450(2).

FINDINGS OF FACT

Henderson Aviation Co., Inc. is a pesticide operator licensed by the Department. ORS 634.116. John P. Henderson is a pesticide applicator licensed by the Department (ORS 634.122), and an employee of Henderson Aviation. In each of the four situations, Mr. Henderson made the pesticide application by aerial spray from a helicopter flown by him in the course of his employment

with Henderson Aviation, and pursuant to an agreement between Henderson Aviation and the owner of the property sprayed.

In the four situations, Mr. Henderson applied the following pesticides:

1. FMC Corporation Thiodan 50 WP, EPA Reg. No. 279-1380, (Thiodan);

2. Ciba-Geigy Tilt Fungicide, EPA Reg. No. 100-617 (Tilt);

3. Fermenta Bravo 720 Fungicide, EPA Reg. No. 50534-188 (Bravo);

4. DowElanco Lorsban 4E, EPA Reg. No. 62719-23 (Lorsban).

The labels of each of the pesticides were approved by the Environmental Protection Agency (7 USC § 136a), and registered with the Department. (ORS 634.016). The labels of Thiodan, Bravo, and Lorsban contain similar warnings and directions:

> Thiodan: " * * * Do not apply or allow to drift to areas occupied by unprotected humans or beneficial animals. * * * Do not apply this product in such a manner as to directly or through drift expose workers or other persons. * * * ."

(Ex 1-6.)

> Bravo: " * * * DO NOT apply this product in such a manner as to directly, or through drift, expose workers or other persons. * * * ."

(Ex 3-4.)

> Lorsban: " * * * Do not apply this product in such a manner as to directly or through drift expose workers or other persons. * * * ."

(Ex 4-12.)

"Drift" may result from application of the above pesticides, especially application by aerial spray. In making each of the aerial applications, Mr. Henderson left a buffer zone on the treatment site as a precaution against drift, but the width of each buffer zone is not clear. In his testimony, Mr. Henderson estimated the width of each buffer zone, but his estimate is not considered accurate. He was recalling an estimate made at the time of flying the helicopter and when he was unaware that he would have to later recall that estimate at a hearing.

The label of Tilt requires for aerial application to grasses grown for seed in Oregon that the applicator

> "Mix 4-8 fl. oz. of Tilt (maximum 4. fl. oz. on bluegrass) * * * in a minimum of 10 gals. of water/A * * * ."

(Ex 2-7.)

Alpine Elementary School

On April 18, 1990, from 9:50 a.m. to 10:15 a.m., Mr. Henderson applied Thiodan to the Freeman Christmas tree farm. There is a section of the farm which is due west of the Alpine Elementary School. The eastern boundary line of this section is about 150 feet from the western fence of the school playground. There is about a 120-foot wide strip along the eastern boundary line of this section which contains no Christmas trees.

In making the application of Thiodan to this section, Mr. Henderson left a buffer zone of trees along the eastern boundary of the farm. At the edge of the buffer zone along the eastern boundary, he turned on the aerial spray, and flew west. He then turned, and flew east. When he reached the edge of the buffer zone, he shut off the spray. He repeated this pattern until he completed the application to this section. During the application, students and staff were in school and on the school playground. A short time after the application, a representative of the school telephoned the Pesticide Analytical Response Center (PARC), and made a complaint about the application. PARC then notified the Department.

On April 19, the next day, about 11:00 a.m., Dale Mitchell, a Department pesticide investigator, went to the Alpine Elementary School. About 1:00 p.m., Mr. Mitchell took three samples at the school. He first took a control sample from inside the building. He next swabbed a small area of the surface of a upright support of a swingset about 15 feet inside of the west fence of the playground. Finally, he took a composite sample of grass cuttings from six points also about 15 feet inside the west fence of the playground.

Mr. Mitchell identified the samples and placed them in sterile containers according to the Department's standard practice. The samples were then submitted to the Department's Laboratory Services Division for analysis. The results of the laboratory analysis show: no Thiodan was found in the control sample; a small amount of the active ingredient in Thiodan (0.0036 microgram/cm^2) was found in the sample taken from the swingset; and a small

amount of the active ingredient in Thiodan (0.16 ppm) was found in the composite sample of grass.

Laird Property

On May 15, 1991, about 5:30-6:30 a.m., Mr. Henderson applied Bravo to a grass seed field. The property of Paul A. Laird and his wife, on which their home is located, is adjacent to the grass seed field.

In making his application, Mr. Henderson left a buffer zone along the north, east and south sides of the grass field. He first flew east along the northern boundary of the grass field, and sprayed south of that boundary. He then turned, and flew south along the eastern boundary of the grass field, and sprayed west of that boundary. Next, he flew southwest along the southeast boundary of the grass field, and sprayed west of that boundary. Then, he flew west along the southern boundary of the grass field, and sprayed north of that boundary. After he finished spraying along the sides of the grass field, he completed the application by flying an east-west pattern during which he turned on and shut off the spray about when he reached the edge of the buffer zone.

A short time after the application, Mr. Laird telephoned the Department, and made a complaint about the application. On May 16, the next day, John Schmitz and Kent Smith, Department pesticide investigators, went to the Laird property. They took two samples in an area of the Laird backyard near the western boundary of the

property. They first took a sample of grass cuttings, and then dug a soil sample.

The samples were identified, and placed in sterile containers according to the Department's standard practice. The samples were then submitted to the Department's Laboratory Services Division for analysis. The results of the laboratory analysis show that a small amount of the active ingredient in Bravo (0.37 ppm) was found in the grass sample, but no detectable amount was found in the soil sample.

Parker Property

On July 1, 1991, about 5:16 a.m.-8:30 a.m., Mr. Henderson applied Lorsban to trees on a Christmas tree farm. Jerry Parker's home is on property adjacent to the Christmas tree farm. Mr. Parker's property consists of about 27 acres, and is immediately south of a line of fir trees which grows along the southern boundary of the Christmas tree farm. Mr. Parker maintains cattle and dogs on his property. In addition, a strawberry field owned by Carl Berg is in the vicinity of the Christmas tree farm. Mr. Berg observed the application of the pesticide. Mr. Parker heard the helicopter, but was unable to see it because of haze.

In making his application, Mr. Henderson left a buffer zone as he flew along the southern boundary of the Christmas tree farm. The line of fir trees which grows along that boundary is about 20-30 feet tall. There is an open space in that line of trees.

About 9:30 a.m. that day, Mr. Berg telephoned the Department and made a complaint about the application. About 11:15 a.m. that same day, Janet Fults, a Department pesticide investigator, went to the Berg property where she took samples. A few days later, Ms. Fults went to the Parker property where she took a sample of grass at a point near the north end of the dog kennel, which is about 400 feet south of the fir trees which grow along the southern boundary of the Christmas tree farm. She next dug a soil sample at a point in the open space in the line of fir trees about 400 feet directly north of the sample taken on the Parker property.

The samples were identified, and placed in sterile containers according to the Department's standard practice. The samples were then submitted to the Department's Laboratory Services Division for analysis. The results of the laboratory analysis of the samples taken from the Berg property show no detectable amount of the active ingredient in Lorsban. The result of the laboratory analysis of the grass sample taken from the Parker property shows the presence of a small amount of the active ingredient in Lorsban (0.13 ppm). The result of the laboratory analysis of the soil sample taken from among the fir trees on the Christmas tree farm shows the presence of a small amount of the active ingredient in Lorsban (1.03 ppm).

Heitzman Property

On June 29, 1990, Mr. Henderson applied Tilt to a grass seed field owned by Mr. Heitzman. The pesticide was mixed by an employee of Henderson Aviation in 7.5

gallons of water per acre, not in a minimum of 10 gallons of water per acre as required by the pesticide label for aerial application. The label was on the pesticide container at the time the pesticide was mixed for application.

In order to become licensed as a pesticide applicator, the Department requires a person to pass written examinations, which include the "[c]omprehension of labeling format, labeling terminology, and the labeling warnings and instructions." OAR 603-57-120(1)(a).

ULTIMATE FINDINGS OF FACT, REASONING AND CONCLUSIONS OF LAW[3]

THE STATUTE

In the State Pesticide Control Act, the legislature delegated to the Department the responsibility "to regulate in the public interest the * * * application and of pesticides." ORS 634.012. There is a need for regulation because pesticides

> " * * * may injure health, property, wildlife or environment by being * * * applied or used in an improper or careless manner. * * * ."

Id.

The Department's regulatory authority includes the power to "impose a civil penalty on a person" who engages in conduct relating to pesticide application, sale or labeling which is prohibited by the Act. ORS

---

[3] To the extent that any ultimate finding of fact or conclusion of law may be reasonably interpreted as a finding of fact, such ultimate finding or conclusion is hereby included in the findings of fact.

634.900(1). The legislature listed certain prohibited acts in ORS 634.372. The violations alleged here are based upon ORS 634.372(2), which prohibits a person from

> " * * * intentionally or willfully apply[ing] or us[ing] * * * any pesticide inconsistent with its labeling * * * ."

Therefore, ORS 634.372(2) prohibits a person from intentionally applying a pesticide in a manner not permitted by or contrary to the directions on the label. The label states directions and warnings regarding application of the pesticide. (*See, e.g.*, Exs 1-6, 3-4 and 4-12.) As previously discussed, the directions on a label are subject to approval by the EPA and the Department before the pesticide may be applied in Oregon. 7 USC § 136a; ORS 634.016(4)(d). The directions are intended to assist an applicator in making a proper and safe application of the pesticide.

From a regulatory point of view, compliance with the directions should prevent the kinds of injuries which the Department has the responsibility to protect against. The prohibition in ORS 634.372(2) is recognition by the legislature that the directions are a means of protection against injury from application. That statute promotes respect for the directions on a label. That statute does not permit less than strict compliance with the directions: noncompliance is not excused where no injury results or only a small quantity of a pesticide is applied contrary to the directions. Such exceptions would lessen the protection intended in ORS 634.372(2).

The Hendersons contend (Resp Cl Arg 8-10) that the term "intentionally" in ORS 634.372(2) means that a person must intend to apply a pesticide contrary to the directions on its label. Under the Hendersons' interpretation, a person under certain circumstances could apply a pesticide inconsistent with the directions, and not commit an act prohibited by the statute. The Hendersons' interpretation would limit the effectiveness of ORS 634.372(2).

In the context of ORS 634.372(2), the term "intentionally" means that a person intends to make application of a pesticide (*i.e.*, he does so purposefully, and not accidentally or inadvertently), but not that he also intends to make the application contrary to the directions on the label. This interpretation includes negligent conduct, but not limited to such conduct as ORS 634.372(4).[4] This interpretation affords the protection intended by the legislature.

THE LABELS

Alleged violation No. 2 involves aerial application of a pesticide to a grass seed field, and for such an application the label directs the applicator to

> "Mix 4-8 fl. oz. of Tilt (maximum 4 fl. oz. on bluegrass) * * * in a minimum of 10 gals of water/A * * * ."

(Ex 2-7.)

---

[4] ORS 634.372(4), which prohibits "application activities in a faulty, careless or negligent manner," applies to more kinds of conduct than an application contrary to the directions on a label. *See* Res Cl Arg 8.

The direction is clear, and there is no dispute over the mixture required.

Alleged violations Nos. 1, 3, and 4, each involve application of a different pesticide, but the labels of the pesticides contain similar statements:

> " * * * Do not apply this product in such a manner as to directly or through drift expose workers or other persons. * * * ."

(Ex 1-6; *accord* Exs 3-4 and 4-12.)

The statement was written as a direction to pesticide applicators and operators to assist in application of the pesticide. For EPA approval, the directions on a pesticide label

> " * * * must be stated in terms which can be easily read and understood by the average person likely to use or supervise the use of the pesticide. * * * ."

40 CFR 156.10(i)(1)(i). The direction was *not* written to identify legal prerequisites for determining whether a person has correctly applied a pesticide, or to be subjected to the same kind of technical analysis used in interpretation of a statute. Such a technical analysis of the statement could frustrate the protection intended by the direction, as well as the protection intended by the legislature in enacting ORS 634.372(2). The Hendersons' analysis focuses on two words of the direction: "drift" and "expose."[5]

---

[5] The words "drift" and "expose" are not defined in the EPA regulations at 40 CFR 170.3(a).

(1) Drift

The parties essentially agree on the meaning of the word "drift" as used in the direction. "Drift" may be defined as a movement of particles of pesticide through the air at the time of application.

This meaning of drift provides assistance to pesticide applicators and operators; that is, do not apply the pesticide in a manner that allows movement of it which "expose[s] workers and other persons." This meaning is also consistent with the legislature's reliance upon the directions on a pesticide label as a protection against injury in ORS 634.372(2).

(2) Expose

The parties do not agree on the meaning of the word "expose" as used in the above direction.

The Department understands that "expose" means application of a pesticide that creates a situation where a person may come into contact with the pesticide. (Memorandum of Law 5.) Therefore, according to the Department's understanding, the presence of the pesticide in a place off the treatment site as a result of drift "expose[s]" a person in that place to the pesticide.

The Hendersons contend that whether or not a person is "expose[d]" through drift depends upon the dose of the pesticide which the person receives (*i.e.*, the amount of the pesticide that gets inside the body of the person and can have an adverse effect). (Resp Ex 5 at 3). Under the Hendersons' understanding, an applicator who applies a pesticide in a manner that allows the

pesticide to drift off the treatment site onto nearby land occupied by a person does not "expose" the person regardless of the quantity of the pesticide which drifts onto the land so long as the person fortuitously does not absorb or ingest the pesticide, or does not receive a dose which his body cannot tolerate. According to Hendersons, the direction informs an applicator not to apply the pesticide so as to allow a quantity that will injure a person to drift to an area occupied by the person, or conversely directs an applicator to apply the pesticide to allow to drift only so much of it that will not cause injury. Because the quantity of pesticide that will injure a particular person under the circumstances would virtually always be unknown, the Hendersons' understanding of "expose" provides little direction to applicators and operators before or during an application, and instead concentrates on what often may be the fortuitous results of an application.

The direction is intended as a protection against injury, and as such, an application of a pesticide may be made contrary to the direction without resultant injury. The direction is not intended as an authorization to allow drift so long as no injury results, or as a standard to be used after an application of pesticide to determine whether the application was safe. Because the word "expose" is part of a direction related to *application* of a pesticide, the meaning of "expose" must provide assistance in making an application. The Department's understanding of the meaning of "expose" provides such assistance.

According to the Department's understanding, the direction informs an applicator not to apply the pesticide

in a manner that results in drift of any quantity to an area where a person may come into contact with it, or put another way, the direction informs an applicator not to allow *any* drift of the pesticide to an area occupied by a person.

The Department's understanding is also consistent with the ordinary meaning of "expose": "to lay open a person to something." Webster's Third New International Dictionary, 802 (1976). In addition, this meaning furthers the protection intended by the legislature in enacting ORS 634.372(2).

The Hendersons' understanding of "expose" includes more than the ordinary meaning, and would frustrate the direction as a means to prevent injury and the protection intended by the legislature.

Therefore, the Department's understanding of the meaning of "expose" is the appropriate meaning.

THE VIOLATIONS

Heitzman Property (Violation No. 2)

The label of Tilt requires for aerial application to grasses grown for seed in Oregon that the applicator mix "4-8 fl. oz. * * * in a minimum of 10" gallons of water per acre. (Ex 2-7.) The label was on the pesticide at the time the Tilt was mixed for application. There is no dispute that before Mr. Henderson made the aerial application of Tilt to Mr. Heitzman's grass seed field, the pesticide was mixed by an employee of Henderson Aviation in only 7.5 gallons of water per acre, and that the mixture was contrary to the requirement on the label.

Mr. Henderson made the application in the course of his employment with Henderson Aviation, and did so "intentionally." ORS 634.372(2). There is no evidence that he made the application by mistake or inadvertence.

Based upon the above facts, the Hendersons "intentionally * * * appl[ied a] pesticide inconsistent with its labeling." ORS 634.372(2).

Alpine Elementary School (Violation No. 1)

The directions on the label of Thiodan state it should not be applied in a manner that "through drift expose[s] workers or other persons." (Ex 1-6.) The direction means that an applicator should not apply Thiodan in such a manner that at the time of application there is movement of the pesticide to an area which is occupied by persons.

On April 18, 1990, from 9:50 a.m. to 10:15 a.m., Mr. Henderson applied Thiodan to the Freeman Christmas tree farm in the course of his employment with Henderson Aviation. The playground of the Alpine Elementary School begins about 150 feet east of a section of the tree farm sprayed by Mr. Henderson.

About 1:00 p.m. the next day, Mr. Michell, a Department pesticide investigator, went to the playground in response to a complaint about the spraying, and took a swab from the swingset and a composite sample of grass cuttings from the playground of the school. The Department's laboratory analysis of the samples indicated the presence of a small amount of the active ingredient in Thiodan in the samples.

There is no evidence that the pesticide moved from the treatment site to the playground by any means other than drift. The Hendersons acknowledge that the Department does not have to "*disprove* every mechanism of transport other than drift to support a violation" of ORS 634.372(2). (Resp Cl Arg 5).

Based upon the facts, it is reasonable to infer that on April 18, 1990, Thiodan moved from the treatment site to the playground through "drift," as that word is used in the above direction on the label. The Department was not required to prove drift with the certainty that Dr. Witt, the Hendersons' consultant, requires for a scientific determination; therefore, the Department was not required to take the number of samples necessary to establish the pattern of drift which Dr. Witt requires. Although the samples taken did not satisfy Dr. Witt, he acknowledged that the samples taken did *not* show "that there was *not* drift." (Emphasis added.) Dept Cl Arg 5.

Because the school premises were occupied by students and staff on April 18, the presence of Thiodan on the playground "expos[ed]" them to the pesticide on that date, as that word is used in the above direction.

Because the presence of Thiodan "expose[d]" the students and staff on April 18, there was no need for the Department to also take tissue and clothing samples from them to prove actual contact with the pesticide as the Hendersons argue. (Resp Cl Arg 3.) As discussed above, proof of actual injury or the likelihood of injury is not required for "expos[ure]" as the Hendersons contend. (*Id.* at 3-4.)

Therefore, the Hendersons applied Thiodan inconsistent with the directions on the pesticide label. ORS 634.372(2).

Laird Property (Violation No. 3)

The direction on the Bravo label was the same as on the Thiodan label, and has the same meaning as discussed in Violation No. 1.

On May 15, 1991, Mr. Henderson applied Bravo to the grass seed field adjacent to the residence of Mr. and Mrs. Laird. Mr. Henderson made the application in the course of his employment with Henderson Aviation. On May 16, the next day, the Department pesticide investigators went to the Laird property in response to a complaint by Mr. Laird about the application. In the Laird backyard, the investigators took a sample of grass cuttings. The Department's laboratory analysis of the sample indicated the presence of the active ingredient in Bravo in the grass cuttings.

There is no evidence that the pesticide moved from the treatment site to the Laird property by any means other than drift.

Based upon the above facts, it is reasonable to infer that Bravo moved from the treatment site to the Laird property through "drift" on May 15, 1991, as that word is used in the direction in question on the label. Because the Laird property was occupied by the Lairds on May 15, the presence of Bravo in their backyard "expose[d]" them to the pesticide on that date, as that word is used in the direction on the label.

The Hendersons make similar contentions regarding lack of proof and the meanings of "drift" and "expose," which were made and rejected in Violation No. 1. The reasons for rejection of their contentions will not be repeated. *See* reasoning regarding Violation No. 1.

Therefore, the Hendersons applied Bravo inconsistent with the direction on the label. ORS 634.372(2).

Parker Property (Violation No. 4)

The direction on the Lorsban label was the same as on the Thiodan and Bravo labels, and has the same meaning as discussed in Violation Nos. 1 and 3.

On July 1, 1991, Mr. Henderson applied Lorsban to a Christmas tree farm adjacent to the property on which Mr. Parker's home is located. Mr. Henderson made the application in the course of his employment with Henderson Aviation. Within a few days after the application, a Department pesticide investigator went to the Parker property in response to a complaint about the application by a neighbor of Mr. Parker. The investigator took a sample of grass near the dog kennel on Mr. Parker's property, and dug a soil sample in an open space along the southern boundary of the Christmas tree farm about 400 feet directly north of the point where the grass sample was taken. The Department's laboratory analysis indicated the presence of the active ingredient in Lorsban in the samples.

There is no evidence that the pesticide moved to the open space along the southern boundary of the Christmas

tree farm and from the treatment site to the Parker property by any means other than drift.

Based upon the above facts, it is reasonable to infer that Lorsban moved from the treatment site to the Parker property through "drift" on July 1, 1991, as that word is used in the direction in question on the label. Because Mr. Parker's house is on the property and the positive sample was taken near the dog kennel, which is an area undoubtedly frequented by Mr. Parker, the presence of Lorsban on the Parker property "expose[d]" Mr. Parker to the pesticide, as that word is used in the direction on the label.

Again, the Hendersons made contentions similar to those made regarding Violations Nos. 1 and 3. Their contentions are rejected for the same reasons. *See* reasoning regarding Violation No. 1.

Therefore, the Hendersons applied Lorsban inconsistent with the directions on the label. ORS 634.372(2).

THE PENALTIES

The Department's rules (OAR 603-57-500 through 603-57-530) provide a method for calculation of the amount of a fine for a violation of the Act. ORS 634.900(1). The method includes a formula:

NB + [(.1 x NB)(P + H + R + C)] = Penalty Amount.

OAR 603-57-530(4).[6] The letters in the formula represent the factors in ORS 634-915(2) which the Director is to consider in imposing a penalty. The rules assign several values to each letter (*e.g.*, depending upon the violator's conduct).

In the Notices of Imposition of Civil Penalty, the Department provided an explanation of application of the formula to each violation. In their answers filed in response to the notices, the Hendersons alleged an affirmative defense: "The calculation of penalties is without basis in fact or law and an abuse of discretion." The Hendersons had the burden of presenting evidence to support their affirmative defense. ORS 183.450(2). The Hendersons did not dispute the values assigned in the notices to: the "B" factor in Violations Nos. 2, 3 and 4; the "P" factor in all violations; and the "C" factors in Violations Nos. 1, 2 and 3.

(1) "B" Factor

The "B" factor is the base fine for a violation, and is determined from a "matrix" set out in the rules. OAR 603-57-530(4)(b). The matrix is based upon the magnitude and the gravity of the violation. OAR 603-57-525. The Hendersons contend that the Department's determination of the gravity of Violation No. 1 is "arbitrary, capricious and not supported by the facts." (Resp Cl Arg 13.)

---

[6] The Department has done more than "adopt by rule a schedule establishing the amount of civil penalty that may be imposed by a particular violation." ORS 634.915(1). The Department has adopted the above formula to assist the Director in his consideration of the factors listed in ORS 634.915(2).

In the notices to the Hendersons, the Department explained that the "gravity was determined to be high because there was evidence of surface contamination" away from the treatment site (the playground of the Alpine Elementary School). (Notices, II.) According to the matrix, the existence of any one of several factors "shall constitute the gravity being considered to be of high level." OAR 603-57-525(3). One of the factors is "evidence of surface * * * contamination." *Id.* at (a)(B)(ii).

The Hendersons argue (Resp Cl Arg 13) that the amount of pesticide found was insufficient to "contaminate" the playground. They state that " 'contaminate' means to render something unusable or unfit for its regular use." (*Id.*)

The Hendersons disregard that the Department is the ultimate authority on the intended meaning of its rules. The Department intends "contamination" to mean evidence of presence of the pesticide, regardless of the amount, on the ground. Moreover, the fact that the Department decided to treat any contamination of the ground, regardless of the extent of the contamination, as a "high" level of gravity, is not an abuse of discretion. *See generally, Mary's Fine Foods, Inc. v. OLCC*, 30 Or App 435, 439-440, 567 P2d 146, *rev den* 280 Or 683 (1977).

(2) "N" Factor

The "N" factor is the number of times within three prior years of and including the "current violative act" that the Department has "determined" that the person has committed "that violative act." OAR 603-57-530(4)(a). A "violative act" is a "prohibited act [relating to pesticide

application, sale or labeling] under ORS 634.372" (OAR 603-57-500(6)); that is, a "violation" for civil penalty purposes under ORS 634.915(2)(b):

> "Any prior violations of statutes, rules or orders pertaining to pesticide application, sale or labeling."

In other words, the "N" factor is the number of times within three prior years of the current violation, and including the current violation, that the Department has determined that a person has committed the same violation as the current one. The

(a) 1988 violation

On October 11, 1989, the Department notified the Hendersons by letters of the results of an investigation of an aerial application of a pesticide made by them to a tree farm on May 17, 1988. (Dept Exs 5-1, 5-2.) The letters indicated that the application was made inconsistent with the label of the pesticide. ORS 634.372(2). The letters stated that they were "intended as a formal warning":

> " * * * Pertaining to the pesticide product application investigated a violation of ORS 634 has been identified as detailed. * * * Further violations of ORS 634 may be subject to departmental actions."

Id.

The Hendersons argue that in the above letters that the Department made no "official 'finding' of a violation." (Resp Cl Arg 14.) However, the above letters explain the Department's investigation of the application, and its conclusion that the application was a "violation."

The letters notified the Hendersons that the Department had made a determination that they had committed a violation. *See* OAR 603-57-530(4)(a).

The Hendersons point out that the letters stated that they were a "warning" and that "[n]o further action * * * is presently anticipated." (Resp Cl Arg 13.) However, the "warning" was that the Department had determined that they had committed a violation and that "[f]urther violations" may be subject to "departmental actions." (Dept Exs 5-1, 5-2.) The letters did *not* indicate that the Department had concluded its investigation without finding a violation.

Finally, the Hendersons incorrectly contend that there was "no right to contest or appeal the warning." (Resp Cl Arg 13.) *See*, ORS 183.310(5), ORS 183.484. Further, Hendersons did not present any evidence at this hearing that this "prior violation" did not occur.

The violation may be considered as a prior violation under ORS 634.915(2)(b) and OAR 603-57-530(4)(a).

Because that prior violation is within three prior years of Violations Nos. 1 and 2, the "N" factor for the latter violations is 2 and 3 respectively.

(b) 1990 and 1991 violations

In the Notices of Imposition of Civil Penalty, the Department notified the Hendersons of its determination of Violations Nos. 1, 2, 3, and 4. In the notices, the Department used Violation No. 1 to enhance the penalty for Violation No. 2; Violations Nos. 1 and 2 to enhance the

penalty for Violation No. 3; and Violations Nos. 1, 2, and 3 to enhance the penalty for Violation No. 4.

The Hendersons object to the Department's use of the violations to enhance the penalties because after receipt of the notices they denied the violations, and requested a hearing. (Resp Cl Arg 14-15.) The Hendersons' objection relates only to the Department's use of the violations *before* the hearing, and does not relate to calculation of the penalties *after* the hearing in which they were found to have committed the violations. Therefore, Violations Nos. 1, 2, and 3 may be considered as prior violations of ORS 634.372(2) in the calculation of the penalties under ORS 634.915(2)(b) and OAR 603-57-530(4)(a).

Because the May 1988 violation and Violation No. 1, which occurred on April 18, 1990, are within three prior years of Violation No. 2, which occurred on June 29, 1990, the value of the "N" factor for the latter violation is 3.

Because Violation Nos. 1 and 2 occurred within three prior years of Violation No. 3., which occurred on May 15, 1991, the value of the "N" factor for the latter violation is 3.

Because Violation Nos. 1, 2 and 3 occurred within three prior years of Violation No. 4, which occurred on July 1, 1991, the value of the "N" factor of the latter violation is 4.

(3) "H" Factor

The "H" factor is the "[h]istory of the person in taking all feasible steps * * * necessary and appropriate to prevent or correct a violative action." OAR 603-57-530(4)(d). In the

notices, the Department assigned the value of 0 to the "H" factor for each violation; that is, there was "insufficient information on which to base a finding." *Id.* at (B).

The Hendersons argue that the Department's assignment of a value of 0 "was arbitrary and capricious" because the Department made no "investigation into the elements of the H factor." (Resp Cl Arg 14.) As a result, they contend the "most favorable value" (-2) should be assigned to the "H" factor. Again, the Hendersons' argument relates to the calculation of the penalties in the notices made *before* the hearing.

The Hendersons' affirmative defense alleged in their answers raised an issue over the correct calculation of the penalties, and they had the burden of presenting evidence at the hearing to show an error in the calculation. ORS 183.450(2).

There is no evidence at the hearing that the Hendersons "took all feasible steps to correct any prior violations." OAR 603-57-530(4)(d)(A). That is, the evidence does not show that a value of -2 should be assigned to the "H" factor. Rather, the factors are that the Department's investigations were insufficient to establish which necessary and appropriate "feasible steps," if any, were taken by the Hendersons to prevent or correct any of the violations. OAR 603-57-530(4)(d)(B). That is, the facts show that a value of 0 should be assigned to the "H" factor in the calculation of the penalty for each violation.

(4) "R" Factor

The "R" factor is "[p]reventability of violation and whether negligence or misconduct was involved." OAR 603-57-530(4)(e). The "R" factor is intended to assist the Director in his consideration of the factor in ORS 634.915(2)(e):

> "Whether the cause of the violation was an unavoidable accident, negligence or an intentional act."

Under the statute and the rule, the Director should consider whether there was a casual relationship between the violator's conduct and the violation. To use the terms of the rule, the Director should consider whether the cause of the violation was not preventable or was the result of the violator's negligence.

(a) Violations Nos. 1, 3, and 4

At the hearing, the Hendersons presented evidence related to the reasonableness of Mr. Henderson's application of the pesticides. However, based upon that evidence it cannot be found that the violations were "unavoidable"; *i.e.*, the violations were, in fact, accidents. OAR 603-57-530(4)(e)(A); *see generally*, 9 Am Jur Proof of Facts 2d 623, 633-35, § 3 (1976). The Department's evidence did not focus on whether Mr. Henderson's applications were reasonable because the reasonableness of a person's conduct is not a defense to commission of an act prohibited by ORS 634.372(2). Therefore, based upon the Department's evidence it cannot be found that the violations were "reasonably avoidable"; *i.e.*, the violations were the result of Mr. Henderson's negligence. OAR

603-57-530(4)(e)(C); *see generally,* 9 Am Jur Proof of Facts 2d, *supra.* In addition, based upon the evidence it cannot be found that at the time of the applications Mr. Henderson was aware that drift was beyond his control, and he made the applications anyway. Dept Cl Br 27.

Where the evidence is insufficient to support a finding that a violation was either "unavoidable" or "reasonably avoidable," the Department's rule provides that a value of 0 should be assigned to the "R" factor. OAR 603-57-530(4)(e)(B). Therefore, a value of 0 is assigned to the "R" factor in the calculation of the penalties for Violations Nos. 1, 3, and 4.

(b) Violations No. 2

The Department's rule assigns a value of 7 to the "R" factor where "the person's actions were flagrant." OAR 603-57-530(4)(e)(D). A person's actions are "flagrant" when he had "actual knowledge of the law and knowingly committed the violation." OAR 603-57-500(3).

As explained above, the Hendersons "intentionally applied [the pesticide Tilt to the Heitzman property] inconsistent with its labeling," because the pesticide was mixed "contrary to the requirement on the label." Such application constitutes a violation of ORS 634.372(2).

In a prior order concerning violations of the same statutes by a different company, Target Pest Control, the Director found:

> [F]or a violation, the evidence must show that a person intended to apply a pesticide (i.e., he did so purposefully and not accidentally or

> inadvertently) and that the application was, in fact, inconsistent with its labeling.

Target Order, at 32, lines 19-24. Further, the Target Order explains,

> [T]he Department's rule apparently does not require that a pesticide operator must have awareness of the wrongdoing. The requirement that a "flagrant" violation must be "knowingly" committed (OAR 603-57-500(3)) is intended to mean that the operator must be aware that the applicator is performing a pest control service within the scope of his employment.

Target Order, at 40, lines 25-36; at 41, lines 1-4.

To apply a different interpretation of the rule in the present case would lessen the protection afforded by the statutes and defeats the purpose of the rules. The statute does not permit less than strict compliance with the directions: noncompliance is not to be excused for any reason, particularly when the applicator and operator have admitted the violation. (*See* Resp Cl Arg 9, 15.)

Hendersons' admitted failure to read and/or follow the label directions does not mitigate the violative act. Licensed operators and applicators are presumed to know the law and are required to abide by the label directions. Henderson Aviation is a licensed operator, and John Henderson is a licensed applicator. Licensees are presumed to possess the knowledge that the rules and regulations governing their business must be strictly adhered to. The Director found in the Target case that whether or not an operator knew of the violative act of an applicator was irrelevant, because a requirement of actual knowledge would permit a violation of the law to avoid

the penalty for a prohibited act. There is no requirement that actual knowledge is a prerequisite to a finding of a violation; Hendersons are not permitted to a reduced penalty simply for claiming they did not read the label.

Further, the Director must take notice of the prior order in the Target case, and in doing so, finds that the actions of the Hendersons were indeed flagrant; to find otherwise would be inconsistent with a prior agency order and would defeat the purpose of the agency's regulatory authority.

Therefore, a value of 7 is assigned to the "R" factor in the calculation of the penalty for Violation No. 2. OAR 603-57-530(e)(C).

(5) "C" Factor

The "C" factor is the "[c]ooperativeness * * * of the person to assist * * * in [the] investigation and to * * * rectify the violation." OAR 603-57-530(4)(f).

Based upon the evidence related to Violation No. 4, the Hendersons refused to mail the documents to the Department as requested, and did not provide an explanation of the documents when asked. The documents were not provided until an investigator went to the Hendersons' office to obtain them. It is reasonable to infer that the documents would not have been provided if the investigator had not gone to the office.

The above facts do not show that the Hendersons were cooperative in the investigation. Based upon the above facts, the Department does not contend that a value other than 0 should be assigned to the "C" factor.

OAR 603-57-530(4)(f)(C). The facts do show, at least, that the Hendersons were "neither cooperative nor uncooperative." *Id.*

Therefore, a value of 0 is assigned to the "C" factor in the calculation of the penalty for Violation No. 4.

ORDER

Based upon the above findings of fact, ultimate findings of fact, reasoning and conclusions of law, Henderson Aviation Co., Inc., and John P. Henderson committed the above violations. Based upon the Department's penalty formula and the above values, Henderson Aviation Co., Inc., and John P. Henderson are subject to the following civil penalties:

Henderson Aviation Co., Inc.:

Violation No. 1 -	$ 592
Violation No. 2 -	1,350
Violation No. 3 -	888
Violation No. 4 -	1,480
TOTAL	$4,310

John P. Henderson:

Violation No. 1 -	$ 592
Violation No. 2 -	1,350
Violation No. 3 -	888
Violation No. 4 -	1,480
TOTAL	$4,310

DATED this 7th day of August 1992.

/s/ Bruce Andrews
Bruce Andrews, Director
Oregon Department of
Agriculture

NOTICE: You are entitled to a judicial review of this Order. Judicial review may be obtained by filing a petition for review in the Oregon Court of Appeals within 60 days from the date of service of this Order. Judicial review is pursuant to the provisions of ORS 183.482.

IN THE SUPREME COURT OF THE STATE OF OREGON

JOHN P. HENDERSON and HENDERSON AVIATION CO., INC., Petitioners, Petitioners on Review, v. DEPARTMENT OF AGRICULTURE, Bruce Andrews, Director, Respondent, Respondent on Review.	Agency No. 603-714-NR021-91 CA A76943 **ORDER DENYING REVIEW** CA A76943 SC S41578

The Court has considered the petition for review and ORDERS that it be denied.

Dated this 4th day of October, 1994.

/s/ Wallace P. Carson Jr.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

Van Hoomissen, J., not participating

c: Julie K. Bolt
Laura V. Potter
Richard David Wasserman